

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 17 May 2004

CASE NO.: 2003-LHC-642

OWCP NO.: 02-127894

IN THE MATTER OF

**MICHAEL N. MARTIN,
Claimant**

v.

**DYNCORP AEROSPACE OPERATIONS,
Employer**

and

**ACE AMERICAN INSURANCE CO.,
Carrier**

APPEARANCES:

**JONATHAN W. CARTEE, ESQ.
STAN MORRIS, ESQ.
On behalf of the Claimant**

**KEITH L. FLICKER, ESQ.
On behalf of the Employer**

**Before: LARRY W. PRICE
Administrative Law Judge**

DECISION AND ORDER DENYING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein LHWCA), 33 U.S.C. § 901, et seq., and the Defense Base Act (herein DBA), 42 U.S.C. § 1651, et seq., brought by Michael N. Martin (Claimant)

against Dyncorp Aerospace Operations (Employer) and Ace American Insurance Company (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held in Birmingham, Alabama, on November 25, 2003. All parties were afforded a full opportunity to adduce testimony and offer documentary evidence. The following exhibits were received into evidence:

1. Claimant's Exhibits 1-24; and
2. Employer's Exhibits A-X.

Employer's Exhibit Y was submitted post-hearing and is hereby admitted. Based upon the stipulations of the parties at the hearing, the evidence introduced, and the arguments presented, I find as follows:

I. STIPULATIONS

1. Jurisdiction is not a contested issue. Claimant's claim falls under the Defense Base Act, as Claimant was working for Employer under a contract with the Department of State.
2. Date of workplace injury: April 22, 2000.
3. Injury in course and scope of employment: Yes.
4. Employer/employee relationship at time of accident: Yes.
5. Employer was timely notified of the injury.
6. Notice of Controversion was timely filed.
7. Average weekly wage at time of injury: \$1219.18.¹
8. Temporary total disability compensation benefits for Claimant's back injury were paid for a fifteen-month period.² No benefits have been paid for Claimant's psychiatric disability.

¹ The parties tentatively agreed at the hearing that Claimant earned a salary of \$65,000 per year and agreed to brief the issue. (Tr. 262-63). Claimant's brief sets forth Claimant's average weekly wage as \$1,219.18, and in the absence of any objection by Employer, the Court accepts Claimant's figure as the accurate measure of such.

² The parties agreed at the hearing that Claimant has been paid the correct amount of compensation for temporary total disability as to the back injury.

9. Claimant has reached maximum medical improvement (MMI) with regard to his back injury.
10. Claimant has not reached MMI with regard to his psychiatric disability.

II. ISSUES

The unresolved issues in this proceeding are:

1. Causation as to Claimant's psychiatric disability.
2. Nature and extent of Claimant's back injury.
3. Medical expenses for psychiatric disability.

III. STATEMENT OF THE CASE

Claimant's Testimony

Claimant was born in 1970 and raised in Starkville, Mississippi. (Tr. 23-24). In 1993, he graduated from Auburn University with a degree in electrical engineering and a degree in German. (Tr. 24). Claimant affirmed that he is fluent in German and also knows some Russian but denied that he was an "academic type." (Tr. 91). He denied that his career has been a combination of academic/management work and hands-on work. (Tr. 94). Claimant acknowledged that he has been involved in several different businesses since graduating from college. (Tr. 96).

From 1994 until 1997, Claimant worked for a construction company as an electrical assistant. (Tr. 24-26). The construction company was building an embassy in Azerbaijan, and Claimant's job responsibilities included installing conduits and electrical devices and keeping track of the job's progress. (Tr. 25). Claimant then opened two businesses with a partner—a car stereo store and a pawn shop. He testified that he closed the business because he was not "making enough [money] to make ends meet." (Tr. 26).

Claimant began working for Employer in March 1999 as an installation technician. (Tr. 26-27). Claimant worked at various embassies overseas in places such as South Africa, Bahrain, Egypt, Italy and France. (Tr. 30-32). After his initial assignment in South Africa, Claimant was promoted to a supervisory position as a team leader. (Tr. 31-32). In December 1999, Claimant was sent to Paris to replace another team leader. (Tr. 32).

In the four to five months that he was in Paris, Claimant was doing a complete upgrade for physical security in the embassy. (Tr. 34). Claimant sustained a back injury when he attempted to move a 2,000-pound door from a cart into the embassy. (Tr. 37). Claimant went to the emergency room in Paris, where he was given some pain medication. (Tr. 39-40). He then flew back to Birmingham, Alabama, and went to see Dr. Ellen Witt, a chiropractor who referred him to Dr. Thomas Francaville, a neurosurgeon. (Tr. 41, 44). Dr. Francaville determined that surgery was not required at that time, so he referred Claimant to Dr. Hisham Hakim, a neurologist. (Tr. 44).

During his course of treatment with Dr. Hakim, Claimant was prescribed Zanaflex, Vioxx and Oxycontin for pain. (Tr. 45). He underwent several epidural injections and also had acupuncture and chiropractic treatments. In October 2000, Dr. Hakim diagnosed Claimant with depression and prescribed Celexa. (Tr. 46). Claimant testified that he was depressed due to his back injury and its effects, including a decreased activity level and weight gain. (Tr. 56-57). In addition, Claimant began experiencing hearing loss and discovered that he had some type of non-cancerous growth or cyst on his brain. (Tr. 47-48). Claimant saw Dr. Thomas Staner, who did not believe that surgery was required at that point. (Tr. 48-49). At one point, Claimant was concerned that he might suffer a stroke if his brain tumor continued to grow. He affirmed that it expanded about fourteen percent over a period of time. (Tr. 114). He testified that he was "a little bit" bothered by the growth of the tumor but that the tumor eventually stopped growing and went away. (Tr. 115).

In January 2001, Dr. Hakim sent Claimant to Dr. Howard Strickler for a functional capacity evaluation (FCE). (Tr. 51). Carrier later sent Claimant to see Dr. Ronald Moon, after which time Carrier discontinued payment of compensation benefits based upon Dr. Moon's recommendations. (Tr. 52). Claimant worked out of his home in Birmingham, writing an alarm systems manual for Employer. (Tr. 52-53). Claimant then relocated to Virginia, where he finished writing the manual and returned to work for Employer in the training department. (Tr. 53). Although Claimant was paid the same amount of money that he had received overseas, he received no overtime pay, nor did he receive a per diem. (Tr. 53-54).

Claimant continued to write manuals while he was in the training department. He was then moved to the physical security section in a managerial position. (Tr. 54). Claimant acknowledged that this was a promotion but testified that he was paid less money than he made as a technician. (Tr. 83-84). Claimant felt that Employer gave him this job because it fit within his physical limitations. (Tr. 84). At first, Claimant supervised only one employee, but he eventually supervised four other people. Claimant continued to take Zanaflex, Vioxx and Propoxy while working, but he only took Celexa occasionally. (Tr. 55).

Claimant testified that he was not used to an office environment. Doing this type of work, rather than doing physical labor, working with a team and traveling, was stressful for him. (Tr. 57-58). A few times, Claimant felt that Employer was not happy with his job performance because Pat Judd, the head of the facility, gave him pointers on management. (Tr. 71, 84-85). He also felt that there was friction between himself and his co-workers. (Tr. 59). Claimant explained that both Mr. Judd and his supervisor, John Ball, asked him who he was dating, which made him feel uncomfortable because he was afraid that they knew that he had sexuality issues. (Tr. 59-61, 89-90). At some point in June 2002, Claimant stopped coming into work. (Tr. 67). He testified that he called work every day to report to either Mr. Judd or to Mr. Ball that he was not feeling well and would not be coming into the office. (Tr. 65-66). Nonetheless, Mr. Ball called him on a Friday and said that it appeared that Claimant had abandoned his job. (Tr. 67). Over that weekend, Claimant attempted suicide by taking an overdose of Zanaflex. (Tr. 67, 124-25).

On June 18, 2002, Claimant was admitted to the psychiatric ward of Potomac Hospital for mental health reasons. (Tr. 62, 69). Before this time, Claimant had never seen a psychiatrist or a psychologist and had only been treated for depression by Dr. Hakim. (Tr. 68). He explained that he was not taking his anti-depressant medication regularly. In addition, he was under some financial stress because he had three mortgages. (Tr. 62). Claimant also felt frustrated because he was unable to physically renovate his houses. (Tr. 64). Ultimately, these issues, combined with Claimant's back injury and job-related stress, "just became too much." (Tr. 62, 126). Claimant told the doctors at the hospital "everything," including his issues with his sexuality and the fact that he had been sexually abused by his father. (Tr. 86-87). He did not know why the medical records did not indicate his complaints about back pain. (Tr. 87). Claimant acknowledged that he was scheduled for a brain MRI right before he attempted suicide but denied that it was a major cause of his suicide attempt. (Tr. 115-16). He noted that he began taking Celexa before he learned about his brain tumor. (Tr. 118).

Claimant was in the mental hospital for about five days, during which time he treated with Dr. Karen Beliles, a psychiatrist. (Tr. 64-65, 72). While at the hospital, Claimant called Greg Dodge, the head of Employer's office, and Mr. Dodge told him that he had been terminated. (Tr. 68-69). After leaving the hospital in June 2002, Claimant treated with Dr. Beliles for three or four months. (Tr. 72). During this time, he sought unemployment benefits from the state of Virginia, which Employer disputed on grounds of job abandonment. (Tr. 77). After Claimant submitted his hospitalization records to the state, the Virginia Department of Labor awarded him unemployment benefits for six months, which were later extended another three months. (Tr. 77-78).

Claimant does not believe that he deserved to be fired by Employer, but he also does not necessarily believe that he was capable of doing the job. (Tr. 120). Claimant affirmed that he suffered from depression from October 2000 through June 2002 but was

capable of working during that time. (Tr. 130-31). Claimant acknowledged having problems in his childhood but testified that he dealt with these issues and they did not affect him during the time before his back injury. (Tr. 127-28). In addition, Claimant agreed that he was capable of working after June 2002. (Tr. 131).

Claimant was hospitalized a second time in June 2003 after his brother and sister got a call from a concerned friend who told them that Claimant had been acting differently and had not been leaving his house. (Tr. 72-74). Claimant's siblings took him to see Dr. Hakim, who recommended that Claimant be hospitalized at a mental health unit until he recovered. (Tr. 74-75). When Claimant was admitted to the psychiatric hospital, he was suffering from delusions that people from Employer were following him and that there was radiation coming from the television into him. (Tr. 116-17). Claimant began treating with Dr. Elizabeth Lachman, a psychiatrist who continues to see him. (Tr. 75).

In a typical day, Claimant takes several medications, including Vioxx, Zanaflex, Risperdal, Zyprexa and Lexapro. (Tr. 43). He occasionally takes Ambien when he has trouble sleeping. (Tr. 79). Claimant sometimes stays at home because he does not feel like getting out. When he does get out, he goes to visit a friend at the car stereo shop. (Tr. 80). He does not have health insurance. (Tr. 75). Claimant is restricted from lifting over thirty pounds and from continuous lifting over twenty pounds. (Tr. 51). Claimant has done some part-time work in the last year, but nothing has worked out, which Claimant attributes to the fact that he frequently has to see doctors. (Tr. 73). Claimant affirmed that his back continues to give him problems. (Tr. 75).

Claimant has recently worked at a pawn shop in which he formerly had an ownership interest. (Tr. 98). He worked forty hours a week at the shop assessing jewelry for about two months. (Tr. 99-100). Claimant earned about \$800 a month and acknowledged that this amount is all that he is allowed to earn while drawing Social Security benefits. (Tr. 103-04). Claimant denied that he is capable of working a forty hour a week job, explaining that he had to take frequent breaks. (Tr. 100-01). He believes that he is capable of working thirty hours a week within his restrictions. (Tr. 102).

Claimant receives \$1200 a month in total disability benefits from Social Security for his back and psychiatric problems. (Tr. 76, 106). He affirmed that his brother is the guardian of these funds and testified that he is unsure of whether he is capable of managing this money himself. (Tr. 105). Claimant would like to return to gainful employment because he enjoys working and because his doctors have advised him that engaging in activities is helpful for his condition. At this time, Claimant does not believe that he could hold "a real job," because he needs an employer who is willing to understand his situation and work within his limitations. (Tr. 80).

Claimant owned three rental properties until two weeks before the hearing in this case, when he sold one of the properties. (Tr. 106-07). He makes the management decisions with regard to these properties, including collecting rent from tenants. (Tr. 108). However, Claimant termed himself “unsuccessful” as a property manager. (Tr. 109). Claimant also had a wholesaler’s license for buying and selling cars but has since closed his used car business. (Tr. 110-11). Claimant also had a bartering company. (Tr. 112). Both of these businesses were reported on Claimant’s 2001 and 2002 tax returns. (Tr. 110-13). Claimant testified that the businesses were losing money and were too stressful to run, so he closed them. (Tr. 113).

Testimony of Roy S. Katzen

Mr. Katzen has worked on about a dozen cases for Employer’s counsel in the past three years and estimated that he does about seventy-five percent defense work and twenty-five percent plaintiff’s work. (Tr. 233). He expects to bill about \$5,000 or \$6,000 for his work on Claimant’s case. (Tr. 254). In putting together his vocational report on Claimant, Mr. Katzen collected information from records and from Claimant himself. Based on information obtained about Claimant’s work history, skills and education, he developed a profile, adjusted the profile based upon Claimant’s current capacities and then identified suitable occupations. Mr. Katzen then made a list of the most appropriate jobs for Claimant and contacted specific employers in Claimant’s geographical area. (Tr. 252).

Mr. Katzen acknowledged that a long period of time passed between Claimant first learning of his brain tumor in October 2000 and first attempting suicide in June 2002. (Tr. 240-41). He did not mean to infer a causal relationship between the two in his report. (Tr. 239).

Mr. Katzen opined that Claimant is able to work at any of the jobs referenced in his report. (Tr. 243, 245). In making his findings, he relied on Dr. Hakim’s determination in November 2001 that Claimant was able to return to light or medium duty work. (Tr. 246). Mr. Katzen affirmed that he did not really have to rely upon Dr. Moon’s findings to make his conclusions. (Tr. 247).

When Mr. Katzen assessed Claimant’s employability, he imposed light to medium duty restrictions from a physical standpoint but imposed no restrictions from a psychiatric standpoint, although he was aware of Claimant’s own feelings about returning to work as well as Dr. Hilton’s and Dr. Lachman’s respective assessments. (Tr. 248). Mr. Katzen agreed that Claimant’s work at the pawn shop, where he assessed jewelry, is the type of work that Claimant is capable of doing. (Tr. 247). He explained that even though this job is less skilled than some of Claimant’s past jobs, Claimant has shown an ability to do that type of work. (Tr. 248). Mr. Katzen also thought it was relevant that Claimant had been running some businesses, because it demonstrated Claimant’s ability to manage

finances as well as the other tasks involved in managing property, such as collecting rent, bookkeeping and making repairs. (Tr. 249).

According to Mr. Katzen, Claimant's present wage-earning capacity is about \$35,000 to \$40,000 per year. (Tr. 252). Claimant could earn a salary of \$65,000 (his previous salary) or even more after he accrues some experience. (Tr. 252-53).

Mr. Katzen testified that if he were interviewing Claimant for a job, he would not be influenced by Claimant's psychiatric and medical history or by the fact that Claimant takes a lot of medication. (Tr. 243-45). He affirmed that prospective employees are not compelled to disclose their medical conditions to prospective employers. (Tr. 250-51).

Deposition of John Charles Ball

Mr. Ball works for Employer as a project manager for one of its contracts. (EX. Y, p. 3). Since 1991, he has been the project manager for a construction security management contract with the Department of State. (EX. Y, pp. 3-4). Under the contract, Employer installs security systems and ballistic doors and windows at American embassies overseas as a sub-contractor, and Mr. Ball deals with the prime contractor on the project. (EX. Y, pp. 4-6). Between 1999 and 2002, RDR was the prime contractor, and Pat Judd was RDR's project manager. (EX. Y, p. 5).

In 1999, Mr. Ball made the decision to hire Claimant as a technical installer of security systems for various overseas embassies. (EX. Y, pp. 6-8). In addition, when Claimant was not overseas, he helped to teach electronics to the new technicians. Mr. Ball testified that Claimant was a very good field technician. (EX. Y, p. 9).

After Claimant was injured in Paris while moving a ballistic door, he did not return to field work because he was physically unable to do so. (EX. Y, pp. 9-10). While Claimant remained at home in Alabama, Mr. Judd assigned him to review manuals and write a lesson plan on security systems. (EX. Y, pp. 11-12). According to Mr. Ball, Claimant's engineering background enabled him to review the manuals and organize the material. (EX. Y, p. 11). Although Employer would not normally have allowed an employee to work out of the home, the company made an exception for Claimant because he was a good employee. (EX. Y, p. 12). Mr. Ball testified that the company was satisfied with Claimant's work on the technical manual assignment. (EX. Y, p. 13).

After Claimant completed this assignment, Employer hired him as a manager for the force entry ballistic rating (FEBR) program in Springfield, Virginia. (EX. Y, pp. 14-15). According to Mr. Ball, Claimant was happy to get back to work and did not express any qualms about his abilities to perform the job or any concerns about doing office work. (EX. Y, p. 20). When Claimant first started the job in January 2002, he supervised one security specialist, but his staff was eventually increased to include three additional

employees. (EX. Y, pp. 17-18, 20). Claimant worked with government officials and with Mr. Judd to develop a program for Employer to survey embassy doors and windows to see if they met the requisite standards. (EX. Y, pp. 15-16). Claimant was responsible for reviewing the security specialists' field reports and reporting to the government officials. (EX. Y, pp. 21-22).

Initially, Mr. Ball had no complaints on Claimant's job performance and did not get involved with Claimant's project very often. (EX. Y, pp. 24-25). Claimant typically reported to Mr. Judd. (EX. Y, p. 25). Mr. Judd never complained to Mr. Ball about Claimant's job performance. (EX. Y, pp. 26-27). Mr. Ball was also satisfied with Claimant's job performance and was unaware of any personality conflicts in the work environment between Claimant and other employees. (EX. Y, p. 28). He testified that everyone at work liked Claimant. (EX. Y, p. 29). Mr. Ball was aware that Claimant had some back problems and was restricted to light duty work. (EX. Y, p. 71).

Mr. Ball denied ever making sexual innuendos to Claimant, asking Claimant about his dating life or discussing Claimant's sexual orientation. (EX. Y, pp. 30-33). Mr. Ball also denied ever speaking with Mr. Judd about these issues. (EX. Y, pp. 33-34). Mr. Ball testified that Claimant never complained to him about these issues. (EX. Y, p. 34).

Approximately four weeks before Claimant's ultimate termination on June 18, 2002, Claimant began missing work two or three days a week, and no one was able to get in touch with him. (EX. Y, pp. 34-37, 40). When he was asked about his absences, Claimant gave various excuses for not coming to work, such as missing a flight or having to reschedule a flight. (EX. Y, pp. 35, 39). Before that time, Claimant had not had any attendance problems and would always prearrange his time off. (EX. Y, p. 36). Mr. Ball was aware that Claimant had many doctors' appointments, some of which were during working hours. He was unaware that Claimant was suffering from depression during that time. (EX. Y, p. 65).

On June 18, 2002, Frank Alsop, the State Department's project manager, contacted Mr. Judd and told him to remove Claimant from the contract. (EX. Y, p. 40). Mr. Ball affirmed that under these circumstances, Employer was compelled to terminate Claimant's employment. (EX. Y, p. 42). According to Mr. Ball, the termination was due to Claimant's attendance issues and not due to his job performance or any sexual orientation issues. (EX. Y, pp. 42-43, 53).

Mr. Ball did not recall whether there was any written documentation of Claimant's absences during the four weeks before his termination. (EX. Y, p. 46). However, he testified that any such documentation would have been in Mr. Judd's RDR file. (EX. Y, pp. 47-48). Mr. Ball did not remember whether he asked Mr. Judd why they had not discussed Claimant's excessive absences before the decision was made to terminate him. (EX. Y, p. 53).

Mr. Ball testified that Claimant is not the first person to have been removed from a contract at the State Department's behest. To the best of his knowledge, these other employees were terminated by Employer as well. (EX. Y, p. 73).

Medical Evidence

Hearing Testimony of Michael Hilton, M.D.

Dr. Hilton specializes in legal psychiatry. (Tr. 132-33). He examined Claimant on two occasions at the behest of Employer's counsel. (Tr. 136-37). Dr. Hilton was asked to perform some psychological testing, review Claimant's medical records and offer opinions on Claimant's psychiatric state and its relationship to his work injury. (Tr. 137). Dr. Hilton explained that he saw Claimant twice because Claimant initially refused to take the MMPI, a psychological test. (Tr. 138). In addition, Claimant refused to talk about any sexual abuse or sexual identity issues.

When Dr. Hilton first saw Claimant in January 2003, he did not have a complete set of Claimant's hospitalization records. (Tr. 139). Dr. Hilton later received the records from both of Claimant's psychiatric hospitalizations, as well as the records of Claimant's present treating psychiatrist, Dr. Lachman. (Tr. 140). Claimant eventually underwent the MMPI. (Tr. 141).

Based on the history taken from Claimant during their first appointment, Dr. Hilton concluded that Claimant was mentally healthy in April 2000 before his back injury occurred. (Tr. 192-93). He acknowledged that there is only one reference in the medical records to Claimant having lifelong depression. (Tr. 195-97). Dr. Hilton never spoke with Claimant's family or co-workers, nor was he aware of Claimant's reputation at work before or after his injury. (Tr. 197-98, 201-02). Dr. Hilton affirmed that Claimant told him that he did not like his post-injury managerial job, that he did not feel like it was the right job for him and that these concerns were causing him stress and anxiety. (Tr. 201-02). He nonetheless testified that he would be surprised if Claimant was depressed given the disparity between his pre-injury and post-injury job situations, although he did acknowledge that Claimant might be unhappy and disappointed by his new job. (Tr. 203-04). Dr. Hilton also acknowledged that Claimant's problems with his co-workers contributed to his suicide attempt. (Tr. 205). However, according to Dr. Hilton, Claimant's complaints of frustration and anxiety relative to his back injury have nothing to do with depression. (Tr. 227-28).

After examining Claimant and reviewing the medical records in this case, Dr. Hilton diagnosed Claimant with paranoid schizophrenia, dysthymic disorder and personality disorder NOS with entitlement issues and avoidancy issues. (Tr. 141). Dr. Hilton explained that schizophrenia is a psychotic condition, and psychosis refers to loss

of touch with reality, including having delusional thoughts. He noted that Claimant had told him that he thought the government had tried to run him off the road and kill him. In addition, Claimant had told Dr. Hakim that he believed his friends were involved in some sort of conspiracy against him. (Tr. 142). When Claimant was hospitalized the second time, he believed that satellites were shooting rays into his stomach and that the television was sending him special messages. (Tr. 143). Dr. Hilton affirmed that these features were the primary reasons that he diagnosed Claimant with paranoid schizophrenia. (Tr. 144). In addition, he noted that Claimant was “right in the time range” for when this condition usually occurs in men. (Tr. 145). Dr. Hilton termed Claimant as “somewhat of a loner and a [*sic*] isolated type.” (Tr. 145-46).

Dr. Hilton explained that Dr. Lachman offered paranoid schizophrenia as a provisional diagnosis, meaning that she did not yet have enough information for a definitive diagnosis. (Tr. 144). Dr. Beliles, who treated Claimant after his suicide attempt in June 2002, noted psychotic symptoms and prescribed Risperdal, an anti-psychotic medication, which Claimant stopped taking between the first and second hospitalizations but is now taking again. (Tr. 146). Dr. Hilton agreed that there was a relationship between Claimant’s discontinuation of Risperdal and his second hospitalization. (Tr. 147). According to Dr. Hilton, Claimant’s condition is a biological illness and without medication he would probably revert back to psychosis. Dr. Hilton was unsure about Claimant’s functional capacities while taking Risperdal. (Tr. 148).

Dr. Hilton testified that before Claimant’s June 2002 hospitalization, there was no mention of depression in his medical records, although Dr. Hakim, who prescribed Celexa for Claimant, had mentioned Claimant’s feelings of frustration and anxiety. (Tr. 152-54). When Dr. Hilton examined Claimant’s medical records from the June 2002 hospitalization, he noted that Claimant’s issues of concern related to his sexuality and sexual abuse by his father, yet there was no indication of back pain on the review of systems. (Tr. 154-55). Even though these medical records did note that Claimant had complained of back pain due to ruptured discs, Dr. Hilton found no correlation between Claimant’s back pain and his depression. (Tr. 156). Dr. Hilton explained that the records indicate Claimant’s frustration with how he was being treated at work and over his sexual issues, in addition to Claimant’s claim that he had been depressed his whole life. (Tr. 157). Dr. Hilton argued that these factors support a diagnosis of dysthymic disorder, which is “a longstanding condition that would have been present for a long time,” exacerbated by stressors at work. (Tr. 157, 159-60).

Dr. Hilton testified that Claimant has entitlement issues as well as resentment that Employer had not treated him fairly. (Tr. 158-59). He opined that Claimant’s back injury did not cause his schizophrenia or his depression. (Tr. 159-60). Dr. Hilton formed his opinion that Claimant’s depression was not related to his back injury based on the early records of Claimant’s psychiatric crises. He explained that during periods of crisis, people are more likely to talk about what is really bothering them, and there is no

discussion of Claimant being depressed due to his back injury in those records. (Tr. 162). Dr. Hilton testified that Claimant will probably suffer some impairment to his earning potential due to his schizophrenia although he could not determine the potential degree of impairment. (Tr. 161).

Dr. Hilton agreed that chronic pain sufferers can suffer from depression, among other responses. (Tr. 164). Dr. Hilton disagreed with Dr. Lachman's diagnosis of post-traumatic stress disorder (PTSD) because Claimant did not exhibit "anywhere near the number of symptoms necessary" to support this diagnosis. (Tr. 166). He felt that his assessment of Claimant's psychiatric condition was more accurate than Dr. Lachman's assessment. (Tr. 186). Dr. Hilton noted that Dr. Lachman did not know about Claimant's previous psychiatric history for a long time. (Tr. 228). He acknowledged that her report did not mention anything about Claimant's sexual orientation or sexual abuse issues. (Tr. 230). Dr. Hilton disagreed with Dr. Lachman's diagnoses of major depressive disorder, recurrent severe with psychotic features, and PTSD. (Tr. 219). He agreed with Dr. Lachman that Claimant suffers from chronic pain syndrome but disagreed with Dr. Lachman's assessment of severe progressive deterioration of functioning since Claimant's work-related injury. (Tr. 219-20). Dr. Hilton agreed that Claimant cannot function safely in the community without ongoing psychiatric care. (Tr. 221-22). He deferred to Dr. Hakim's opinion on the issue of Claimant's physical capacity to return to work. (Tr. 168).

Dr. Hilton was paid \$350 per hour to conduct a psychological examination of Claimant in this case and \$450 per hour to appear in court. (Tr. 172-73). He estimated that he has been paid approximately \$11,000 for his work in this case. (Tr. 173). Dr. Hilton probably made about \$250,000, on his legal psychiatry work last year. (Tr. 173-74). He testified that he has done legal psychiatry work on both the patient side and the employer side. (Tr. 176).

Dr. Hilton acknowledged that someone once filed a complaint against him based on an unfair evaluation, but it was dismissed by the state medical board and the American Psychiatric Association. (Tr. 187, 190). In addition, two people have brought claims against Dr. Hilton in small claims court but these cases were also dismissed. (Tr. 188-89).

Deposition of Ellen Witt, D.C.

Dr. Witt is a chiropractor who treats musculoskeletal complaints. (EX. U, pp. 6-7). She first began treating Claimant after a December 1998 car accident, after which he had complaints of musculoskeletal pain in his back, neck and shoulder. (EX. U, pp. 8-9). She continued treating him for whiplash sprain/strain until March 23, 1999, at which time Claimant still had complaints but had reached MMI. (EX. U, pp. 14-16).

Dr. Witt treated Claimant again after his April 2000 workplace injury. (EX. U, p. 18). Claimant's injuries at this time were "distinctly different" than those sustained in the 1998 car accident. (EX. U, pp. 18-19, 27). His main complaints at that time were lower back and leg pain. (EX. U, p. 20). Dr. Witt treated Claimant from May 3, 2000, until April 2, 2001. In addition, she referred him to Dr. Hakim and Dr. Francavilla for additional treatment. (EX. U, p. 21). By April 2001, Claimant's condition still had not improved. (EX. U, pp. 21-22). Dr. Witt felt that chiropractic treatment was not helping Claimant and that he should treat solely with medical doctors. (EX. U, pp. 22-23).

Deposition of Hisham Hakim, M.D.

Dr. Hakim, a neurologist, typically treats patients with back problems. (CX. 21, pp. 20-21). He also has a special expertise in functional capacity evaluation (FCE) and impairment rating, which he usually does on behalf of the patient in work-related cases. (CX. 21, pp. 32-33). He first saw Claimant on July 10, 2000, on a referral from Dr. Witt for evaluation of back pain. Claimant gave Dr. Hakim the history of his workplace back injury. (CX. 21, p. 8). Claimant showed no signs of depression at that time. (CX. 21, p. 17). After examining him, Dr. Hakim felt that Claimant had lower back tenderness in the lumbosacral area and S1 joint and suspected that his back pain was radiating down his leg. (CX. 21, p. 9). Dr. Hakim prescribed pain medication, recommended an EMG and gave Claimant a muscle stimulator to help his lower back. (CX. 21, pp. 9-10). The EMG, which was performed on August 7, showed a nerve root irritation in the lower lumbar spine. Dr. Hakim continued to treat Claimant with medication and also gave Claimant an injection in his lower back. (CX. 21, p. 10).

On September 1, 2000, Claimant returned to Dr. Hakim. He reported some relief from the injection and the pain medication but was still having difficulty functioning. On October 9, Claimant expressed frustration and anxiety about his pain, which was a precursor to depression, so Dr. Hakim prescribed Celexa to him. (CX. 21, pp. 11, 26). He also gave Claimant another lower back injection. (CX. 21, p. 11). Throughout the remainder of 2000, Dr. Hakim continued to treat Claimant conservatively. (CX. 21, p. 12). On December 11, 2000, Claimant was very anxious about undergoing a brain biopsy. (CX. 21, pp. 41-42).

In January 2001, Dr. Hakim felt that Claimant's condition had stabilized, and he recommended an FCE so that he could place Claimant at MMI. (CX. 21, p. 12). Dr. Hakim referred Claimant to Dr. Strickler for the FCE, and Dr. Strickler determined that Claimant was not suited to return to work at that time. (CX. 21, pp. 24-25). Dr. Hakim thereafter placed Claimant at MMI on February 23, 2001. (CX. 21, p. 13). On June 1, 2001, Dr. Hakim released Claimant to light to medium duty work. (CX. 21, p. 36). In August 2001, Claimant continued to have chronic back pain, anxiety and depression. (CX. 21, p. 45). Dr. Hakim was aware that Claimant eventually returned to work, where he was retrained for another job. (CX. 21, p. 43).

Claimant continued to see Dr. Hakim for complaints of tightness and tenderness in the lower back, and Dr. Hakim continued to treat him conservatively. Claimant was trying to return to light duty work during that time. (CX. 21, p. 13). Dr. Hakim noted that Claimant continued to suffer from depression. (CX. 21, p. 13).

When Dr. Hakim saw Claimant on February 17, 2003, Claimant still had lower back pain, although it had improved somewhat. (CX. 21, pp. 14-15). Claimant told Dr. Hakim that he was being retrained for a job involving jewelry, but Dr. Hakim was under the impression that the job never materialized. He noted that Claimant continued to have anxiety. In the summer of 2003, Claimant's depression was "really severe," and Dr. Hakim was very concerned. He continued to prescribe anti-depressants to Claimant. (CX. 21, p. 13). At one point, Claimant came to Dr. Hakim's office with his brother and sister, who were very concerned about his severe depression. (CX. 21, p. 14). Claimant continued to have lower back pain and was seeing and hearing things. (CX. 20, p. 15). They discussed psychiatric evaluation and treatment, and Dr. Hakim arranged for Claimant to be admitted to the hospital. (CX. 21, pp. 14, 16).

Over time, Claimant's psychiatric condition began to improve with medication, and Dr. Hakim continued to treat him for back pain. (CX. 21, p. 14). On August 25, 2003, Claimant's depression had improved but his back pain was still present. Dr. Hakim administered a cortisone shot and prescribed some medications for Claimant, including Celexa for depression. (CX. 21, p. 16).

According to Dr. Hakim, Claimant's back pain is caused by a bulging disc at L3-4 and L4-5 as well as muscle spasms. (CX. 21, pp. 39-40). Dr. Hakim affirmed that Claimant's back pain is a chronic condition and that it is not unusual for back injury patients to experience severe depression over their injuries. (CX. 21, pp. 26-28). In general, it is not unusual for chronic pain patients to show signs of depression because chronic pain is a physically and mentally debilitating condition. (CX. 21, pp. 17-18). Dr. Hakim testified that Claimant's back pain, not his brain tumor, was probably the cause of his depression. (CX. 21, pp. 40, 53-54). He agreed that the fact that Claimant had never been treated by a psychiatrist or psychologist prior to his back injury was consistent with the depression having been caused or somehow triggered by the back injury. (CX. 21, pp. 51-52).

Dr. Hakim does not believe that surgery is warranted for Claimant's back condition at this time. (CX. 21, p. 23). As of the last time that Dr. Hakim saw Claimant, he believed that Claimant was still capable of doing light duty work. (CX. 21, p. 36). Although Claimant's ability to work is limited by his anxiety and depression, Dr. Hakim is generally in favor of getting patients back to work because it improves their mental health. (CX. 21, pp. 48-50). Dr. Hakim testified that Claimant still suffers from anxiety and depression, which are treatable conditions. (CX. 21, p. 36). In Dr. Hakim's opinion,

Claimant's prognosis for his mental health condition is fair to good if he undergoes aggressive treatment and is thereby enabled to return to work and regain his self-confidence. (CX. 21, pp. 46-47).

Deposition of Ronald T.Y. Moon, Jr., D.O.

Dr. Moon is an osteopath who treats individuals with musculoskeletal injuries and chronic pain. (EX. T, pp. 8-9). He estimated that about seventy-five percent of his practice is devoted to work-related injuries, some of which is plaintiff's work, and about twenty-five percent of his practice is devoted to conducting independent medical evaluations (IMEs). (EX. T, pp. 9-10, 43-44). In this case, Dr. Moon conducted an IME of Claimant at the behest of Employer and Carrier. (EX. T, pp. 10-11).

On April 19, 2001, Claimant was evaluated by Dr. Moon. (EX. T, p. 12). The evaluation involved gathering a comprehensive history and conducting a comprehensive physical examination. In addition, Claimant underwent an FCE conducted by one of Dr. Moon's therapists. Dr. Moon also reviewed Claimant's medical records. (EX. T, p. 12).

Dr. Moon testified that Claimant's medical records indicated degenerative findings but no surgical lesion with regard to his back. (EX. T, pp. 24-25). He explained that the degenerative findings pre-dated Claimant's work-related back injury. (EX. T, pp. 35-36). Dr. Moon testified that his own physical examination of Claimant was very difficult "due to significant inconsistencies, exaggerated pain behavior, positive Waddell signs, submaximal effort, complaining of weakness, etc." He found no evidence of neurological defects and felt that Claimant exhibited inconsistent pain behavior. (EX. T, p. 26). In sum, Dr. Moon could find no objective evidence to support permanent aggravation of a pre-existing condition relating to Claimant's back. (EX. T, pp. 31-32). Dr. Moon testified that while he believes that Claimant does have symptoms of right low back pain, these symptoms are biomechanical in nature and are heightened by psychosocial and secondary gain issues. (EX. T, pp. 30-31). Dr. Moon testified that secondary gain means that an individual has an external rather than an internal focus, such as financial gain or a need for attention. (EX. T, pp. 76-77).

Dr. Moon felt that Claimant was capable of medium duty work, which involves lifting a maximum of fifty pounds and occasional to infrequent bending, stooping and climbing and that Claimant should be restricted from heavy duty work based on his age and the degeneration of his spine. (EX. T, pp. 32-34). In his opinion, Claimant does not have any permanent disability. (EX. T, p. 53). Dr. Moon affirmed, however, that it is possible to be in pain and still have a full range of motion, just as it is possible for pain to become permanent. (EX. T, pp. 53-54).

Dr. Moon testified that he usually bills about five hours of time for a typical IME. (EX. T, pp. 46-47). His standard hourly rate for IMEs and for testifying in depositions is \$350 to \$500 per hour. (EX. T, pp. 47, 69).

Dr. Moon has heard that a circuit judge in Birmingham, Alabama, has deemed him an unqualified witness for medical impairment ratings. (EX. T, pp. 58-59). Dr. Moon explained that he does not give disability ratings and that he believes that the judge in question confused impairment ratings and disability ratings. (EX. T, pp. 64-65). He noted that disability is a legal issue, and a person may be found disabled based upon subjective findings even if there are no objective findings to support an impairment rating. (EX. T, pp. 65-66). Dr. Moon denied that he has a bias toward the defense in a case where he is hired to conduct an IME of a claimant on the defense's behalf. (EX. T, pp. 77-78).

Deposition of M. Elizabeth Lachlan, M.D.

Dr. Lachlan is a psychiatrist who has treated Claimant. (CX. 20, pp. 8-9). She typically treats patients who are referred from other doctors but has also provided opinions in workers' compensation cases. (CX. 20, pp. 46-47). She first saw Claimant on June 12, 2003, on a referral from Dr. Hakim, who explained that Claimant was in crisis. (CX. 20, p. 10). Claimant's brother and sister had brought him to see Dr. Hakim because his friends had called them and reported that Claimant was acting strange and out of character. (CX. 20, p. 20). Dr. Lachman spoke to Claimant alone and then with his brother and sister. (CX. 20, pp. 10-11). Claimant was very distressed and reported that people were following him with a satellite and inflicting radiation on him, which was causing him severe abdominal pain. (CX. 20, p. 11). He was paranoid and believed that he was being watched and followed. (CX. 20, p. 15). In addition, Dr. Lachman observed that Claimant's range of motion was limited by pain. (CX. 20, p. 91).

Dr. Lachman took a history from Claimant and his family. She learned that he had been injured while in Paris. (CX. 20, pp. 13-14). She was concerned about Claimant's safety and recommended that he be hospitalized, to which Claimant finally agreed. (CX. 20, pp. 14-15). In the hospital, Claimant initially refused to eat because he believed that someone was poisoning his food. (CX. 20, p. 15). Claimant improved once he began taking his medication. (CX. 20, p. 16). During his hospitalization, he also was treated with intensive psychotherapy. (CX. 20, p. 23).

Dr. Lachman has been unable to rule out schizophrenia as a diagnosis. (CX. 20, pp. 16-17). She noted that Claimant is in the upper end of the age range for an onset of schizophrenia, and there is no evidence that he has had lifelong symptoms of this disorder. (CX. 20, pp. 27-28). Dr. Lachman testified that Claimant suffers from a major depressive disorder with psychotic features. (CX. 20, pp. 23, 28). If Dr. Lachman concludes that Claimant does suffer from schizophrenia, his major limitation in the future

will be trauma because he suffers from PTSD. She attributed the PTSD to Claimant's back injury and his perception that he had been treated with deceit and betrayal by Employer when he was fired while in the hospital. (CX. 20, pp. 29, 88).

When she first saw Claimant, she knew that he had been hospitalized before but was unaware that it was a psychiatric hospitalization following a suicide attempt. (CX. 20, pp. 17, 19). Dr. Lachman was not surprised when Claimant eventually told her the circumstances of the hospitalization. (CX. 20, p. 19). She noted that he was quite guarded when speaking about it and does not like remembering that phase of his life. (CX. 20, p. 36). Claimant's brother and sister never mentioned his depression or suicide attempt, and Dr. Lachman does not know whether they knew that Claimant had attempted suicide. (CX. 20, p. 57). Claimant did not tell his brother and sister about being terminated by Employer because he was embarrassed. (CX. 20, p. 89).

According to Dr. Lachman, the trigger for Claimant's breakdown was his workplace injury. (CX. 20, p. 27). She was aware that Claimant returned to work after his original injury in Paris but explained that it was irrelevant to her treatment of him whether he was functioning at a normal level during that time. (CX. 20, pp. 61-63). Dr. Lachman testified that she would not necessarily have expected Claimant to cite back pain as his primary complaint during his first hospitalization, even though it was in her opinion the triggering factor for his breakdown, because in psychiatry, the chief complaint is "usually very often not. . . the issue." (CX. 20, pp. 70-71).

Dr. Lachman noted that there was no personal history or family history that could have contributed to Claimant's sudden mental deterioration, nor was there any apparent gradual loss of personal, social or occupational function. (CX. 20, p. 27). Dr. Lachman testified that Claimant was not preoccupied with his brain tumor. (CX. 20, p. 78). Instead, Claimant was preoccupied with the way he perceives being treated at work. According to Dr. Lachman, Claimant felt unsupported because of his sense that no one at work believed that he was having difficulty returning to work after his injury. (CX. 20, p. 79). Dr. Lachman did not find it relevant that Employer paid Claimant compensation benefits and took care of his medical expenses when he was not working. (CX. 20, p. 80). She also did not find it relevant that Employer was happy with Claimant's work at his new position because people can appear to function well in the workplace even though they are having personal difficulties which are not obvious to their co-workers. (CX. 20, p. 82). Dr. Lachman acknowledged, however, that Claimant's circumstances at work were relevant to determining whether he has depression or schizophrenia. (CX. 20, p. 63).

Dr. Lachman has advised Claimant of the importance of taking his medication, abstaining from alcohol and not skipping his appointments. She testified that these issues have not been a problem for Claimant. According to Dr. Lachman, Claimant will need counseling for the rest of his life. (CX. 20, p. 30). Claimant's depression with psychotic

features is a treatable condition. (CX. 20, p. 74). If Claimant continues with medication and psychotherapy, he should be able to function safely in the community. Claimant's psychotherapy visits will probably start to taper off over time once his condition improves. (CX. 20, p. 31). If Claimant becomes non-compliant with his treatment, Dr. Lachman believes that he will be a danger to himself. (CX. 20, p. 35).

Dr. Lachman was aware that Claimant does not have medical insurance at this time and noted that she is not able to see him as often as she would like. (CX. 20, p. 32). At the very least, Claimant requires weekly therapeutic visits, and Dr. Lachman would like to have him see her or her therapists three times a week. (CX. 20, pp. 35, 53). Although Claimant also does not have insurance for his medication, he has applied for patient assistance and Dr. Lachman's office tries to help him out with whatever they have. (CX. 20, pp. 33-34). In addition, Claimant's friends have been instructed to call her office or call his family "if something goes wrong." (CX. 20, p. 33). According to Dr. Lachman, Claimant is very motivated to get well, and he is not a drug seeker. (CX. 20, pp. 36, 44).

At the present time, Dr. Lachman does not believe that Claimant is employable from a mental standpoint, although Claimant would like to believe that he is. (CX. 20, p. 37). She does not know the status of Claimant's back injury but opined that Claimant would probably continue to be in chronic pain as long as his mental condition persists. (CX. 20, p. 38). Dr. Lachman affirmed that Claimant does take medication for difficulty sleeping. She expressed her concern that "no one who's sleep deprived as much as he is would try to hold a job even in the minimal level of functioning." (CX. 20, p. 40). Dr. Lachman is hopeful that Claimant will eventually be able to work, but at this point, "his symptoms have gone on for so long that his prognosis is quite grave." (CX. 20, p. 73).

Dr. Lachman treated Claimant on seven occasions between June 2003 and November 2003. (CX. 20, p. 50). She explained that she might not have charged Claimant for every visit due to his financial difficulties but was unsure whether she saw him at any time between September 11, 2003, and November 8, 2003. (CX. 20, pp. 51-52). She has recently reviewed the records of Dr. Beliles but has never received records from Claimant's first hospitalization, from Dr. Hakim or from Dr. Staner. (CX. 20, p. 54).

Medical Records of Kimberly Fagan, M.D.

On April 25, 2000, Claimant saw Dr. Fagan for low back pain following his April 22, 2000 workplace injury. X-rays taken at that time revealed no bony abnormalities. (CX. 15, p. 3). Dr. Fagan ordered a lumbar spine MRI and sent Claimant to physical therapy for his low back. In addition, he was prescribed some narcotic pain medication. (CX. 14, p. 4). On May 1, 2000, Dr. Fagan noted that Claimant's lumbar MRI was normal. Based on this finding, she decided to continue treating Claimant conservatively,

with a focus on physical therapy and other modalities. (CX. 14, p. 2). On May 3, 2000, Claimant returned for a follow up appointment. He reported feeling somewhat better, although he complained of stiffness in his lower back and occasional radiation of pain down his left leg. Dr. Fagan suspected that Claimant's low back pain was muscular in origin and referred him to Dr. Witt at his request. (CX. 14, p. 1).

Medical Records of Thomas A. Staner, M.D. and Thomas Francavilla, M.D.

On May 16, 2000, Dr. Francavilla, a neurosurgeon, saw Claimant for his low back pain. After examining Claimant, Dr. Francavilla opined that Claimant's back pain was more of a musculoskeletal problem than a neurologic or disc pathology. Dr. Francavilla felt that Claimant should be treated conservatively with chiropractic adjustments. If Claimant's condition did not improve, physical therapy, a lumbar block and myelography were all treatment possibilities. (CX. 19, p. 18). On May 25, Dr. Francavilla saw Claimant on a return visit. Claimant felt frustrated that he did not have an etiology to his pain. His leg pain had improved, but he continued to have back and gluteal pain and wanted to undergo testing. Dr. Francavilla planned to try a lumbar block and then myelography if Claimant's condition still did not improve. (EX. N, p. 4).

On June 22, 2000, Claimant returned after undergoing a lumbar block. The block had reduced Claimant's pain for a while, but it was not returning. He continued to have leg pain radiating down both legs and had undergone chiropractic adjustments. Dr. Francavilla decided to go forward with myelography, although he suspected that it would be negative. (EX. N, p. 5). On July 18, Claimant returned to see Dr. Francavilla after having undergone the CT myelogram, which showed fairly small bulging discs at L3-4 and L4-5 as well as some more advanced degeneration and a small paracentral herniation on the left at L5-S1. There was no evidence of nerve root compression. Based on these findings, Dr. Francavilla did not believe that surgery was necessary and referred Claimant for further rehabilitation. (EX. N, p. 6).

On October 31, 2000, Dr. Staner, also a neurosurgeon, saw Claimant on a consultation for Dr. Hakim. Specifically, Dr. Staner evaluated Claimant for a possible posterior meningioma by the right hypoglossal canal. He noted that Claimant had suffered from hearing problems for years and had also had a previous ear graft on the right side. (EX. N, p. 1). After reviewing some films, Dr. Staner concluded that there was probably no meningioma but that Claimant might have a hypoglossal or acoustic schwannoma. He planed to do another MRI scan to follow up. (EX. N, p. 2). On November 13, Dr. Staner saw Claimant after the MRI, which showed a lesion in the hypoglossal area. Dr. Staner planned to obtain an MRI and a CT scan of the skull. (CX. 19, p. 16). On December 8, Dr. Staner notified Claimant that additional studies were needed in order to better assess the problem. (CX. 19, p. 15).

On January 22, 2001, Dr. Staner saw Claimant for a follow up after Claimant had undergone a SPECT scan of the skull. Based on the studies of Claimant's skull, Dr. Staner recommended a follow up MRI scan in six months and thereafter on a six month basis for the next couple of years. He noted that any change in the size of the brain growth would necessitate more aggressive treatment, such as a biopsy or additional studies. (CX. 19, p. 13). On January 29, after discussing Claimant's case with two other doctors, Dr. Staner suspected that Claimant had a benign cyst. He did not believe that it was a schwannoma, meningioma or eosinophil granuloma but still planned to do a repeat MRI scan of the brain in six months. (CX. 19, p. 12).

On May 25, 2001, Claimant returned for the repeat MRI. Claimant complained of drooping on the right side of his face. (CX. 19, p. 11). On June 11, Dr. Staner observed that the repeat MRI showed no change in the size of the brain cyst. He planned to follow up with additional CT and MRI scans in one year. (CX. 19, p. 10).

On August 5, 2002, Claimant returned to Dr. Staner after the repeat MRI and CT scans. There was no significant interval change in size or appearance between the June 2001 and July 2002 CT and MRI scans. Dr. Staner recommended another MRI in a year and a half unless there were any neurologic changes in the meantime. Dr. Staner noted that Claimant was suffering from headaches as well as a major depressive disorder. The doctors continued to believe that the growth was a benign cyst. (CX. 19, p. 7).

On February 21, 2003, Dr. Staner reported that Claimant's latest MRI and CT scans revealed no lesion at all and were entirely normal. He planned to notify Claimant of these findings. (CX. 19, p. 3).

Medical Records of Chivers M. Woodruff, M.D.

Dr. Woodruff first saw Claimant on October 4, 2000, for a physical examination. At that time, Claimant had complaints of back pain. Upon examination, Dr. Woodruff found that Claimant was in good health other than his back pain and hyperlipidemia. He put Claimant on a low fat diet. (CX. 15, p. 3). On October 30, Claimant returned for a follow up and presented Dr. Woodruff with some MRIs of his right ear. (CX. 15, p. 2).

On October 29, 2001, Claimant returned to Dr. Woodruff for a follow up regarding hyperlipidemia, questionable meningioma and chronic back pain. Claimant continued to have problems with his right ear and with his back pain. As to the back pain, there had been no changes in Claimant's symptoms for six months. Claimant denied any stress, anxiety or sleep disorder. Dr. Woodruff refilled Claimant's prescriptions for Vioxx and Zanaflex and advised Claimant to watch his diet and to participate in exercise activities that would not bother his back, such as bicycling. (CX. 15, p. 1).

Medical Records of Howard Strickler, M.D.

On January 25, 2001, Dr. Strickler performed an FCE of Claimant at Dr. Hakim's behest. (CX. 5). Dr. Strickler recounted the history of Claimant's workplace injury and subsequent treatment. (CX. 5, p. 1). He also summarized Claimant's past medical history, social history and family history. (CX. 5, pp. 1-2). After the FCE was completed, Dr. Strickler determined that Claimant had limitations with regard to standing, walking, sitting, stooping, kneeling, crouching, climbing, lifting and with manual dexterity due to his back pain. Claimant also had limited range of motion of the lumbar spine. Based on the history, medical findings and testing, Dr. Strickler concluded that Claimant was not suited for any level of work activity at that time. He assigned Claimant a whole person impairment of nine percent due to the lumbar spine injury. This injury combined with a mild to moderate hearing loss in the right ear for a total whole person impairment rating of twelve percent. (CX. 5, p. 3).

Medical Records of Potomac Hospital

On June 18, 2002, Claimant was admitted to the hospital for major suicidal depression after taking an overdose of Zanaflex with some wine. (EX. C, pp. 1, 8, 10). He had no prior psychiatric history. When Claimant was admitted, multiple stressors were noted, with prominent concerns about his working environment. He had made several calls to local health care providers seeking assistance before coming to the emergency room.

During his hospitalization, Claimant was treated by Dr. Beliles, who noted that he "was open in discussing elements of his personal and sexual history, which contributed to stress and feeling overwhelmed to the point of having overdosed." Claimant explained that he had been fired for abandonment of his job. He told Dr. Beliles that he needed to work through some issues relating to the death of his parents and prior abuse. Claimant's mood improved during his hospitalization, and on the day of discharge, he told Dr. Beliles that he was no longer suicidal and was receiving emotional support from a friend. Claimant stated that he recognized the need to work on some issues with a psychiatrist and a psychotherapist and elected to follow up with Dr. Beliles. Claimant told her that he was making plans to find a new job and to support himself financially during his unemployment. (EX. C, p. 10).

Medical Records of Karen E. Beliles, M.D.

On July 18, 2002, Dr. Beliles saw Claimant. (EX. D, p. 7). He was still depressed but was no longer acutely suicidal. (EX. D, p. 8). He gave her a VA disability form to fill out and discussed his difficulties at his former job. Claimant told Dr. Beliles that his boss "had it out" for him due to medical and personal reasons. He also reported feeling pressure to overachieve. Claimant was struggling with everyday life and was not

concentrating very well. He was preoccupied with his problems. (EX. D, p. 7). Dr. Beliles noted that Claimant's social isolation would complicate his recovery, while progression with his medical problems would influence his mood. She encouraged Claimant to consider psychotherapy with a regular therapist. (EX. D, p. 8).

On August 1, 2002, Claimant continued to be depressed. He reported having some suicidal thoughts. Dr. Beliles suspected that these thoughts were associated with alcohol consumption and warned Claimant not to drink alcohol. Claimant told Dr. Beliles about two co-workers who made rude comments to him and reported him as a no-show during his hospitalization. Claimant's "main issue [was] work." (EX. D, p. 6).

On August 22, 2002, Claimant had received his unemployment benefits and told Dr. Beliles that he might start looking for work in Alabama. He told her that he wanted a job without much people interaction. He was afraid for his family to find out that he was fired. (EX. D, p. 4). Overall, Claimant's outlook had improved. He still had moderate depression but reported no recent suicidal thoughts. (EX. D, p. 5).

On September 23, 2002, Claimant's condition had declined again. He suspected his friends of being involved in a conspiracy against him. He also believed that he was lied to by a receptionist at a doctor's office. He reported "perceiving hatred and bitterness from other people" and wondered if he was being watched by law enforcement or terrorists. Claimant had been less active due to back pain. (EX. D, p. 2). Dr. Beliles noted that Claimant's paranoia was evident and that his increased anxiety was exacerbating his depression. She and Claimant discussed his feelings of broken trust, ambiguity and uncertainty with respect to his job. Claimant declined to be hospitalized and denied suicidal thoughts. He admitted that he might have a distorted perception of reality. Dr. Beliles prescribed Risperdal for Claimant. (EX. D, p. 3).

On October 29, 2002, Claimant again expressed his feeling that his friends were conspiring against him. The Risperdal had helped somewhat with his feelings of anxiety, but Dr. Beliles felt that it was minimally effective and changed his medication. Claimant commented to Dr. Beliles that the former co-worker who made comments about him was not going to keep his job. Dr. Beliles felt that Claimant had reached a plateau in his depression, with worsened anxiety. She offered partial hospitalization, but Claimant declined. Dr. Beliles encouraged Claimant to find a psychiatrist in Alabama and he agreed that local treatment made sense. (EX. D, p. 1).

Medical Records of Health South Metro West Hospital

Claimant was admitted to the hospital on June 12, 2003, and was discharged on June 17, 2003. Claimant was paranoid and believed that people were "out to get him." (EX. E, p. 1). When Claimant was admitted, he deemed himself only partially reliable as a historian due to his mental status. Claimant's brother and sister, who accompanied him,

were deemed reliable historians but only had limited knowledge of Claimant's recent history. The chief complaints were worsening depression, non-stop tearfulness and worsening paranoia such that Claimant could not function in the community. In Dr. Lachman's history of Claimant's present illness, she noted that Claimant had a history of depression and worsening paranoia ever since his work-related accident. (EX. E, p. 3). Dr. Lachman also observed that Claimant's condition had apparently steadily deteriorated since he had decided to "take a break" from his post-injury employment. She did not ask Claimant about his sexual orientation because he was too distressed. (EX. E, p. 7).

Dr. Lachman's assessment was major depressive disorder recurrent and severe with psychotic features, PTSD, possible schizophrenia and psychotic disorder NOS. She also noted that Claimant suffered from chronic pain syndrome with regard to his back injury. (EX. E, p. 9). She planned to treat Claimant with anti-psychotics, anti-depressants and various forms of therapy. She recommended that his family monitor his care and that he undergo psychiatric follow up. (EX. E, p. 10).

The discharging physician, Dr. McInteer, commented that Claimant had lost his job with the State Department and had "just completely decompensated into what may be a first psychotic break for schizophrenia." His discharge diagnosis was psychosis NOS with multiple biopsychosocial stressors. (EX. E, p. 1). While in the hospital, Claimant, who was initially belligerent, remained isolated and later became "very pleasant and cooperative" and took his medications. (EX. E, pp. 1-2). After discharge, Claimant was to follow up with a psychiatrist. (EX. E, p. 2).

Vocational Evidence

Vocational Evaluation of Roy Katzen, M.S., C.R.C.

Mr. Katzen is a vocational rehabilitation counselor who completed an assessment of Claimant's employability and wage-earning capacity at the behest of Employer's counsel. In preparing his October 28, 2003 report, Mr. Katzen reviewed Claimant's depositions, medical records and personnel records and also interviewed Claimant. (EX. H, p. 1). In terms of physical capacity, Claimant told Mr. Katzen that he could lift or carry twenty-five pounds or more for approximately thirty to forty feet. He could sit for about thirty minutes or one hour before shifting positions. Claimant was able to drive for an hour or more and to walk for approximately one-half mile. Claimant reported that he did not do much stationary standing. He was better able to kneel or squat than to stoop. Claimant told Mr. Katzen that he was leading a very sedentary and inactive lifestyle which involved "mop[ing] around" and "tr[ying] to think of something to do." Based on Claimant's statements and the medical evidence, Mr. Katzen concluded that Claimant could work in a light to medium duty work range. (EX. H, p. 3).

Mr. Katzen noted Claimant's psychiatric history but pointed out that in his July 24, 2003 deposition, Claimant stated that he was considering a sales position with a friend who installed security systems in automobiles. (EX. H, pp. 3-4). Mr. Katzen surmised that Claimant felt capable of performing this work and therefore could return to work in some capacity, despite his psychiatric issues. (EX. H, p. 4).

After summarizing Claimant's education and work history, Mr. Katzen listed several transferable skills retained by Claimant, including academic skills, knowledge and skills in electrical and electronic theory and application, computer skills in software and hardware, customer service skills, job cost/bidding estimation skills, basic supervisory skills, the ability to read blueprints and schematics, curriculum development skills and training and instruction skills. (EX. H, pp. 5-11). Given Dr. Lachman's diagnoses, Mr. Katzen was unsure whether Claimant was capable of applying all of these previously acquired skills, but he noted that Claimant had expressed an interest in attempting sales work, so he considered Dr. Lachman's restrictions in combination with Claimant's self-perception. (EX. H, p. 11).

After developing a Worker's Trait Profile for Claimant, Mr. Katzen identified three suitable occupational categories for Claimant—electrical engineer/field service engineer, sales position for computers and related equipment, and security consultant/sales representative for security systems. (EX. H, pp. 11-16).

Labor Market Survey of Roy Katzen, M.S., C.R.C.

1. Electronic Sales and Service Technician Positions

In an October 29, 2003 labor market survey, Mr. Katzen identified five different electronic sales and service technician positions available in the Birmingham metropolitan area. (EX. I, pp. 1-5). Typically, these jobs had medium to light duty requirements and involved a variety of different types of retail and wholesale sales services. Duties included assisting in installation and repair or to develop propositions on equipment specifications. These jobs might also require ongoing customer contacts. (EX. I, p. 1). Mr. Katzen identified openings for assistant managers and sales associates at Radio Shack. Both positions required good to excellent interpersonal communication skills as both involved direct customer service. While an employee might be required to lift up to fifty pounds on an occasional basis, assistance was available in the form of physical aids and other personnel. (EX. I, p. 2).

CompUSA had openings for a home entertainment lead (retail sales) and a commercial sales representative. Both required sales experience, and the general manager was positive about Claimant's prior experience. The physical demands for both jobs were light, although the home entertainment lead job required more standing than the commercial sales representative job. (EX. I, p. 3). Staples also had openings for

sales associates and specialists, who would have supervisory responsibility. (EX. I, pp. 3-4). The manager told Mr. Katzen that Claimant was definitely qualified for the sales associate position and possibly also for the specialist job. Associates might be required to lift over fifty pounds occasionally and would have to stand and walk during their shifts, but the specialist job was less demanding in terms of lifting and carrying. (EX. I, p. 4).

HiFi Autosound and Security and Classic Car Audio each desired job candidates with prior experience in sales/service of auto sound and alarm systems, and the managers of both businesses felt that Claimant would be an attractive and competitive job applicant. Both jobs required considerable standing and walking while attending to customers, as well as some bending, stooping and kneeling. Lifting requirements were minimal, limited to twenty pounds occasionally. (EX. I, pp. 4-5).

Mr. Katzen concluded that Claimant's qualifications were beyond the minimal level for all of the complaints, and the physical demands for four of the jobs were within his capacity, while the Staples job was questionable. Wages ranged from \$280 to \$500 or more per week, and Mr. Katzen estimated that Claimant would earn between \$400 and \$450 per week. (EX. I, p. 5).

2. Security Consultant/Sales Representative (security system) Positions

Mr. Katzen also contacted six potential security consultant/sales representative (security systems) employers, three of whom had current openings or would consider hiring someone with Claimant's qualifications. (EX. I, pp. 6, 10). The other three employers requested a resume, expressing an interest in Claimant's experience. (EX. I, p. 10).

Individuals in these positions would sell a variety of different alarm and security monitoring services and systems to individuals, businesses and industrial sites. Duties might include contacting or receiving contacts from prospective customers and meeting at homes or businesses to analyze the customer's requirements. Some in depth analysis might be required, particularly at commercial and industrial sites. In addition, employees might monitor and direct the installation of various types of security equipment. (EX. I, p. 6). Physical demands for all jobs were light and within Claimant's physical capacity. Only two employers shared wage information. Entry level positions at those businesses ranged from \$30,000 to \$50,000 per year, with the potential to earn as much as \$100,000 or more per year. (EX. I, p. 10).

IV. DISCUSSION

By express provision of the DBA, the individuals subject to said act are covered for workers' compensation purposes by the LHWCA. In arriving at a decision in this

matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, weigh the evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards v. Donovan, 200 F.2d 741 (5th Cir. 1962); Atlantic Marine, Inc. and Hartford Accident & Indem. Co. v. Bruce, 666 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Ass'n, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 928 (1968). It has been consistently held that the LHWCA must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967).

However, the United States Supreme Court has determined that the “true-doubt” rule, which resolves factual doubt in favor of the claimant when evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), which specifies the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994), aff'g 990 F.2d 730 (3d Cir. 1993).

Having observed Claimant during his testimony and through out the hearing, I did not find Claimant to be a credible witness. While Claimant was very sharp and alert during his testimony, during the rest of the hearing he appeared bored and close to falling asleep. But during portions of the hearing he would become suddenly alert, such as when Dr. Hilton testified that he was paid \$450 per hour for his court appearance. By the end of the hearing I was left with the feeling that Claimant had not been a very truthful witness.

Causation of Claimant's Psychiatric Disability

Section 20(a) of the Act provides the claimant with a presumption that his disabling condition is causally related to his employment if he shows he suffered a harm and employment conditions existed which could have caused, aggravated or accelerated the condition. Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989), aff'd, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989). Once the claimant proves these elements, the claimant has established a prima facie case and is entitled to a presumption that the injury arose out of the employment. Kelaita v. Triple Machine Shop, 13 BRBS 326 (1981); Adams v. General Dynamics Corp., 17 BRBS 258 (1985). With the establishment of a prima facie case, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. James v. Pate Stevedoring Co., 22 BRBS 271 (1989). If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. Del Vecchio v. Bowers, 296 U.S. 280 (1935).

An injury occurs when something unexpectedly goes wrong within the human frame. Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968). An external, unforeseen incident is not necessary; experiencing back pain or chest pain at work can be sufficient.

Darnell v. Bell Helicopter Int'l Inc., 16 BRBS 98 (1984). If an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant condition is compensable. The relative contributions of the work-related injury and prior condition are not weighted in determining Claimant's entitlement ("aggravation rule"). Wheatley, 407 F.2d at 307.

Once the presumption is invoked, the burden shifts to the employer to rebut the presumption by presenting substantial countervailing evidence that the injury was not caused by the employment. See 33 U.S.C. § 920(a). The Fifth Circuit addressed the issue of what an employer must do in order to rebut a Claimant's prima facie case in Conoco v. Director, OWCP, 194 F.3d 684 (5th Cir. 1999). In that case, the Fifth Circuit held that to rebut the presumption, an employer does not have to present specific and comprehensive evidence ruling out a causal relationship between the claimant's employment and his injury. Rather, to rebut a prima facie presumption of causation, the employer must present substantial evidence that the injury is not caused by the employment. Noble Drilling v. Drake, 795 F.2d 478 (5th Cir. 1986), cited in Conoco, 194 F.3d at 690.

As a result of a successful rebuttal of the presumption by the employer, the fact finder must evaluate the record evidence as a whole in order to resolve the issue of whether or not the claim falls within the Act. Del Vecchio v. Bowers, 296 U.S. 280 (1935); Volpe v. Northeast Marine Terminals, 671 F.2d 697 (2d Cir. 1982). The Court must weigh all the evidence in the record and render a decision supported by substantial evidence. See Del Vecchio, 296 U.S. 280 (1935).

Although I did not find Claimant to be a credible witness, I find that, based on his testimony as supported through the records and testimony of Drs. Hakim and Lachman, Claimant has shown that he suffered a psychiatric harm and employment conditions existed which could have caused, aggravated or accelerated the condition. The claimant has established a prima facie case and is entitled to a presumption that the injury arose out of the employment.

I further find that Employer has successfully rebutted the presumption. Dr. Hilton found that Claimant is suffering from early schizophrenia which was neither caused nor aggravated by his employment. This opinion is further supported by Dr. McInteer's opinion that Claimant suffered a first break of schizophrenia. The admission records from Potomac Hospital provide further rebuttal by stating that Claimant's breakdown was related to his being gay, not wanting to lie about it, perception of how his coworkers and peers would treat him upon discovering he was gay and his prior sexual abuse by his father.

As a result of a successful rebuttal of the presumption Employer, I must evaluate the record evidence as a whole in order to resolve the issue of whether or not the claim falls within the Act.

Having reviewed the evidence of record, I find that the most credible psychiatric opinion is that provided by Dr. Hilton. According to Dr. Hilton, Claimant's complaints of frustration and anxiety relative to his back injury have nothing to do with depression.

After examining Claimant and reviewing the medical records in this case, Dr. Hilton diagnosed Claimant with paranoid schizophrenia, dysthymic disorder and personality disorder NOS with entitlement issues and avoidancy issues. Dr. Lachman does not disagree with this diagnosis of schizophrenia. Dr. Hilton explained that Dr. Lachman offered paranoid schizophrenia as a provisional diagnosis, meaning that she did not yet have enough information for a definitive diagnosis. Dr. Beliles, who treated Claimant after his suicide attempt in June 2002, noted psychotic symptoms and prescribed Risperdal, an anti-psychotic medication. When Claimant stopped taking Risperdal he was hospitalized a second time. Dr. Hilton noted that there was a relationship between Claimant's discontinuation of Risperdal and his second hospitalization. According to Dr. Hilton, Claimant's condition is a biological illness and without medication he would probably revert back to psychosis.

Dr. Hilton noted that when Claimant was admitted in June 2002, Claimant's issues of concern related to his sexuality and sexual abuse by his father, yet there was no indication of back pain on the review of systems. Dr. Hilton explained that the records indicate Claimant's frustration with how he was being treated at work and over his sexual issues, in addition to Claimant's claim that he had been depressed his whole life. Dr. Hilton argued that these factors support a diagnosis of dysthymic disorder.

Dr. Hilton testified that Claimant has entitlement issues as well as resentment that Employer had not treated him fairly. He opined that Claimant's back injury did not cause his schizophrenia or his depression. Dr. Hilton formed his opinion that Claimant's depression was not related to his back injury based on the early records of Claimant's psychiatric crises. He explained that during periods of crisis, people are more likely to talk about what is really bothering them, and there is no discussion of Claimant being depressed due to his back injury in those records. In fact, when Claimant had last seen Dr. Hakim in September 2001, he was much improved and had not treated with Dr. Hakim for over eight months prior to his suicide attempt.

I find Dr. Hakim's testimony that Claimant's depression was caused by his back injury to be inconsistent with the facts of the case and with the medical treatment provided to Claimant. Although the exact date Claimant became aware of a possible brain tumor is not known to the Court, the first brain MRI was completed on October 14, 2000 (CX. 19, p. 32) and Claimant indicated to Dr. Hakim that his hearing problem had

been going on for some time prior to October 30, 2000, and had gotten worse recently. (EX. O, p. 20). On October 4, 2000, Claimant had denied any stress, anxiety or sleep disorder. (CX. 15). On October 9, 2000, Dr. Hakim noted Claimant exhibited frustration and anxiety and prescribed Celexia. Subsequently, Dr. Hakim prescribed Celexia on a limited number of occasions which coincide with Claimant's anxiety over his brain tumor. On October 30, 2000, Dr. Hakim noted Claimant had been recommended for brain surgery and he was concerned. On December 11, 2000, Dr. Hakim reported that Claimant was very anxious and nervous about his scheduled brain biopsy. On May 25, 2001, Claimant was noted to have drooping in the right eye and stated he had a brain MRI and CAT Scan scheduled. On each of these occasions Dr. Hakim prescribed Celexia. Claimant was clearly anxious about the brain tumor and was worried that it could cause a stroke. (CX. 5, p. 2).

I note that Dr. Hakim was treating Claimant for his back problem, not for the brain tumor. However, Dr. Hakim's note for the June 11, 2001 visit reflects only discussion of the brain tumor and that it had been found to be benign. Dr. Hakim never prescribed Celexia for Claimant after the tumor was found to be benign. Dr. Hakim saw Claimant next in August 2001 and September 2001. Claimant did not see Dr. Hakim again until after his attempted suicide in June 2002. There is no indication that any doctor prescribed any medicine for depression after the tumor was found benign until after Claimant's attempted suicide.

Dr. Lachman does not disagree with Dr. Hilton's diagnosis. As Dr. Hilton noted, Dr. Lachman did not know about Claimant's previous psychiatric history for a long time. Her report did not mention anything about Claimant's sexual orientation or sexual abuse issues. While Dr. Lachman relates Claimant's depression to the losing of his job in June 2002, Claimant did not lose his job until after he attempted suicide and was hospitalized. While Dr. Lachman appears to give great weight to Claimant's statements concerning problems on the job, I give more weight to Mr. Ball's testimony that as far as he could tell Claimant was happy to get back to work, did not have any qualms about the job, did a satisfactory job and did not have any conflicts with his co-workers.

I find Dr. Hilton's opinion is based on a more accurate history of Claimant's psychiatric illness. I agree with Dr. Hilton's opinion that Claimant's back injury did not cause his schizophrenia or depression. I find Claimant's psychiatric problems are not work related.

Nature and Extent of Claimant's Back Injury

Having established work-related injuries, the burden rests with the claimant to prove the nature and extent of his disability, if any, from those injuries. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum

medical improvement (MMI). James v. Pate Stevedoring Co., 22 BRBS 271, 274 (1989); Trask, 17 BRBS at 60. Any disability before reaching MMI would thus be temporary in nature. The date of MMI is a question of fact based upon the medical evidence of record. Ballestros v. Willamette W. Corp., 20 BRBS 184 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979). An employee reaches MMI when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enter., Ltd., 14 BRBS 395 (1981).

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940). Disability under the Act means an incapacity, as a result of injury, to earn wages which the employee was receiving at the time of the injury at the same or any other employment. 33 U.S.C. § 902(10). In order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Economic disability includes both current economic harm and the potential economic harm resulting from the potential result of a present injury on market opportunities in the future. Metropolitan Stevedore Co. v. Rambo (Rambo II), 521 U.S. 121, 122 (1997). A claimant will be found to have either no loss of wage-earning capacity, no present loss but a reasonable expectation of future loss (de minimis), a total loss or a partial loss.

A claimant who shows he is unable to return to his former employment has established a prima facie case for total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. P & M Crane v. Hayes, 930 F.2d 424, 430 (5th Cir. 1991); New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total compensation until the date on which the employer demonstrates the availability of suitable alternative employment. Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991).

It has been stipulated, and I find, that Claimant reached MMI for his back injury. There is no dispute with the date of MMI, February 23, 2001, as found by Dr. Hakim.

It is also undisputed that Claimant cannot return to his pre-injury employment. Accordingly, I find Claimant has established a prima facie case for total disability.

Suitable Alternative Employment

Once a claimant has established a prima facie case for total disability, the employer may avoid paying total disability benefits by showing that suitable alternative employment exists that the injured employee can perform. The claimant does not have the burden of showing there is no suitable alternative employment available. Rather it is the duty of the employer to prove that suitable alternative employment exists. Shell v.

Teledyne Movable Offshore, 14 BRBS 585 (1981); Smith v. Terminal Stevedores, 111 BRBS 635 (1979). The employer must prove the availability of actual identifiable, not theoretical, employment opportunities within the claimant's local community. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981), rev'g 5 BRBS 418 (1977); Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980). The specific job opportunities must be of such a nature that the injured employee could reasonably perform them given his age, education, work experience and physical restrictions. Edwards v. Director, OWCP, 999 F.2d 1374 (9th Cir. 1993), cert. denied, 511 U.S. 1031 (1994); Turner, 661 F.2d at 1041-1042. The employer need not place the claimant in suitable alternative employment. Trans-State Dredging v. Benefits Review Bd. (Tanner), 731 F.2d 199, 201, 16 BRBS 74, 75 (CRT) (4th Cir. 1984), rev'g 13 BRBS 53 (1980); Turner, 661 F.2d at 1043; 14 BRBS at 165. However, the employer may meet its burden by providing the suitable alternative employment. Hayes, 930 F.2d at 430.

If the employer has established suitable alternative employment, the employee can nevertheless prevail in his quest to establish total disability if he demonstrates that he tried diligently and was unable to secure employment. Hooe v. Todd Shipyards Corp., 21 BRBS 258 (1988). The claimant must establish a reasonable diligence in attempting to secure some type of suitable employment within the compass of opportunities shown by the employer to be reasonably attainable and available and must establish a willingness to work. Turner, 661 F.2d at 1043.

Employers may rely on the testimony of vocational experts to establish the existence of suitable jobs. Turney v. Bethlehem Steel Corp., 17 BRBS 232, 236 (1985); Southern v. Farmers Export Co., 17 BRBS 64, 66-67 (1985); Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231, 233 (1984); Bethard v. Sun Shipbldg. & Dry Dock Co., 12 BRBS 691 (1980); Pilkington v. Sun Shipbldg. & Dry Dock Co., 9 BRBS 473; 477-80 (1978). See also Armand v. American Marine Corp., 21 BRBS 305 (1988) (job must be realistically available). The counselors must identify specific available jobs; market surveys are not enough. Campbell v. Lykes Bros. Steamship Co., 15 BRBS 380, 384 (1983); Kimmel v. Sun Shipbldg. & Dry Dock Co., 14 BRBS 412 (1981). See also Williams v. Halter Marine Serv., 19 BRBS 248 (1987) (must be specific, not theoretical, jobs). The trier of fact should also determine the employee's physical and psychological restrictions based on the medical opinions of record and apply them to the specific available jobs identified by the vocational expert. Villasenor v. Marine Maintenance Indust., 17 BRBS 99, motion for recon. denied, 17 BRBS 160 (1985). To calculate a claimant's wage earning capacity, the trier of fact may average the wages of suitable alternative positions identified. Avondale Indust. v. Director, OWCP, 137 F.3d 326 (5th Cir. 1998).

A job within an employer's facility continues to meet the employer's burden of proof where it is suitable and available even if the claimant fails to report to work.

Walters v. Ingalls Shipbldg., Inc., 31 BRBS 75 (CRT) (5th Cir. 1997). Once an employer establishes suitable alternative employment by providing light duty work which a claimant successfully performs but is subsequently discharged for breeching company rules and not for reasons related to his disability, the employer does not bear any new burden of providing other suitable alternative employment. Brooks v. Director, OWCP, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993); see also Harrod v. Newport News Shipbldg. & Dry Dock Co., 12 BRBS 10, 14-16 (1980) (employer met burden by showing alternative job, even though the claimant was later fired for bringing a gun to work). Once a claimant is terminated for reasons unrelated to the work-related disability, the employer no longer has a duty to show suitable alternative employment and has no duty to pay further compensation benefits. Darby v. Ingalls Shipbldg., Inc., 99 F.3d 685, 30 BRBS 93 (CRT) (5th Cir. 1996).

Following his release to restricted duty, Employer provided employment to Claimant, first out of his home writing technical manuals and later as a manager in Virginia. When the manager position started in January 2002, Claimant supervised one security specialist. His staff eventually increased to include three additional employees. Claimant was responsible for reviewing the employees' field reports and reporting to government officials. Employer was pleased with Claimant's performance in this position. I find that Claimant was performing necessary work for employer and through this position Employer has established suitable alternative employment.

As stated, Employer was pleased with Claimant's performance in this position. However, during May 2002 Claimant began to miss work two or three days per week and no one was able to get in touch with him. Mr. Alsop, the State Department's project manager, asked that Claimant be removed from the contract because of his attendance problems. I find that it was because of these attendance issues that Claimant was terminated. I find that Claimant was terminated for reasons unrelated to back injury and Employer no longer has a duty to pay further compensation benefits.

Medical Expenses

Section 7 of the Act provides in pertinent part: "The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). In order to assess medical expenses against an employer, the expenses must be reasonable and necessary. Pernell v. Capital Hill Masonry, 11 BRBS 582 (1979).

Employer shall continue to be responsible for the reasonable and necessary expenses related to treatment of Claimant's back injury. Employer is not responsible for any expenses related to treatment of Claimant's psychiatric disorders.

Conclusion

Based on the foregoing findings of fact, conclusions of law and the entire record, I hereby enter the following compensation order. All other issues not decided herein were rendered moot by the above findings.

ORDER

It is hereby ORDERED, JUDGED AND DECREED that:

The claim for compensation and medical benefits for Claimant's psychiatric condition is hereby **DENIED**.

ORDERED this 17th day of May, 2004, at Metairie, Louisiana.

A

LARRY W. PRICE
Administrative Law Judge

LWP:bbd